

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:08-cr-441-T-17MAP

PHILIP WILLIAM COON

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**VICTIM BORROWERS' OBJECTION TO REPORT AND RECOMMENDATION OF  
THE UNITED STATES MAGISTRATE JUDGE AS TO DEFENDANT'S PLEA**

The Coast Bank of Florida (hereinafter "Coast Bank") borrowers listed on the attached Exhibit "A" (hereinafter "borrowers") object to the Report and Recommendation (Dkt. #11) of the United States Magistrate Judge regarding the acceptance of defendant's plea, and state:

1. Defendant entered into a plea agreement on October 8, 2008 (hereinafter "Plea Agreement") (Dkt.# 3).
2. In the Plea Agreement, defendant agreed to enter a plea of guilty as to Count One of the Information, which charges the defendant with conspiracy to commit wire fraud and money laundering, in violation of 18 U.S.C. §371.
3. Pursuant to 18 U.S.C. §1343, a person is guilty of mail fraud for "having devised or intending to devise any scheme or artifice to defraud."
4. 18 U.S.C. §1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

5. On November 5, 2008, defendant pled guilty to the offenses listed in the Plea Agreement.

6. The Plea Agreement contains blatant misstatements of fact intended to cast Coast Bank, rather than the borrowers, as having been deprived by defendant “of the intangible right of honest services.”

7. Borrowers, through their undersigned counsel, appeared at the hearing on November 5, 2008 before the magistrate on defendant’s change of plea and attempted, under the authority of 18 U.S.C. §3771 (“Crime Victims’ Rights Act”), to state borrowers’ objections to the Plea Agreement as stated below. The magistrate refused to allow the undersigned to make this argument.

8. Borrowers secured mortgage loans from Coast Bank to acquire residential lots primarily in Southwest Florida and to have homes built on them.

9. Defendant was the Executive Vice-President of Mortgage Lending for Coast Bank.

10. As admitted in the Plea Agreement, defendant conspired with a mortgage broker (John Miller of AML) to charge an extra point at each mortgage loan closing, which defendant and the mortgage broker split between them

11. The Plea Agreement at page 18 recites the following erroneous conclusion concerning the borrowers’ exposure for the extra point overcharge:

The additional one percent charged as a result of the conspiracy did not affect the amount paid by the borrower as the builder/seller was responsible for the payment of all closing costs.

12. To the contrary, Paragraph J.1 of the typical Coast Bank Construction Loan Agreement utilized for borrowers’ loans reads in pertinent part:

The Borrower shall pay, or provide payment for all costs of the closing of the Loan and all expenses incurred by the Lender with respect thereto, including but not limited to, . . . loan fees . . .

Attached as Exhibit "B" is a typical Coast Bank Construction Loan Agreement.

13. Furthermore, Coast Bank required that each borrower execute "Borrower's Authorization of Closing Funds," which on its face indicates that closings costs were being paid out of the loan proceeds. Attached as Exhibit "C" is a typical "Borrower's Authorization of Closing Funds."

14. Finally, the loan closing statements themselves for these loans reflect closing costs, including the loan fees, being paid out of the loan proceeds. Attached as Exhibit "D" is a typical loan closing statement.

15. Coast Bank and its successor, First Bank, have received loan payoffs from borrowers which include the extra point overcharge which is the subject of the Plea Agreement or have foreclosed on borrowers' loans and secured judgments including the extra point overcharge.

16. The Plea Agreement at page 19 recites the following erroneous conclusion concerning supposed economic harm suffered by Coast Bank:

The scheme gave the defendant incentive to deal with AML, which resulted in Coast having a higher concentration of loans in one particular area with one particular builder than was prudent.

17. The officers and directors of Coast Bank were fully aware of the extent of loan business defendant was generating with AML and the involved builder ("CCI"). Consequently, the concentration of loans, and any economic impact resulting therefrom, resulted not from the "scheme" but instead from Coast Bank's flawed policies.

18. The Plea Agreement at page 19 recites the following misleading conclusion

concerning supposed economic harm suffered by Coast Bank:

The scheme also exposed Coast Bank to the risk of litigation brought by one or more of the participants in the residential development/home loan program from which the defendant procured the illicit proceeds.

19. There were indeed many lawsuits filed against Coast Bank by its borrowers citing fraudulent acts by defendant. However, the overcharge of points and the skimming of the extra point charged by defendant was not alleged as the primary basis of recovery in the lawsuits filed. Consequently, although Coast Bank may have been exposed to the possibility of litigation arising from the actions of defendant forming the basis of the plea, the overcharge of points was but the “tip of the iceberg” relative to what Coast Bank was being sued for.

20. What defendant in essence did was overcharge the borrowers and convert such money for his personal use.

21. Some borrowers have paid their mortgages in full, including the extra point overcharge which is the subject of the Plea Agreement.

22. First Bank, the successor to Coast Bank, has entered into workouts with many borrowers, resulting in significant sums being paid to the bank.

23. Other homes and properties have been foreclosed upon and sold by First Bank, bringing in additional sums to the bank.

24. First Bank is presently collecting deficiency judgments from several foreclosed Coast Bank borrowers, which judgments include the loan proceeds disbursed by Coast Bank which found their way into the pocket of the defendant.

25. “Honest services” in the context of the scheme would have been for defendant to charge the borrowers the standard one point at closing. The borrowers were

deprived of their “intangible right to honest services” when defendant charged borrowers the extra point and pocketed it. Since it is not contended in the Plea Agreement that Coast Bank was required to absorb the extra point, it is illogical for Coast Bank, rather than the borrowers, to be framed in the Plea Agreement as having suffered economic harm and as a result having been deprived of its “intangible right to honest services.”

### **MEMORANDUM OF LAW**

In 1988, Congress passed 18 U.S.C. §1346, which supported mail and wire fraud prosecutions in which the alleged “scheme to defraud” was a scheme “to deprive another of the intangible right of honest services.” In United States v. Rybicki, 287 F.3d 257, 260 (2<sup>nd</sup> Cir. 2002), the Court held that the following elements are required to establish the offense of honest services fraud pursuant to 18 U.S.C. §1346:

1. A scheme or artifice to defraud;
2. for the purpose of depriving another of the intangible right of honest services;
3. where it is reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis*; and
4. use of the mails or wires were used in furtherance of the scheme.

In interpreting 18 U.S.C. §1346, courts have addressed “who” has a “right to honest services” and what is included in these services.

A consumer/customer, such as the borrowers here, can be deprived of the “intangible right of honest services.” For example, in United States v. Williams, 441 F.3d 716 (9<sup>th</sup> Cir. 2006), certiorari denied, 127 S.Ct. 295, the defendant was an insurance salesman and financial planner who sold an annuity to a victim (Stubbs) for whom he acted as a power of attorney and converted the victim’s monies to his own personal account. The court held that defendant was guilty of wire fraud under 18 U.S.C. §1346 for depriving Stubbs of the “intangible right of honest services,” reasoning:

Stubbs employed Defendant as a fiduciary, and Defendant therefore undertook the high duties of honesty and loyalty to him. Specifically, Stubbs hired and relied on Defendant as a financial advisor and estate planner. He entrusted Defendant with large sums of money and signed a durable power of attorney naming Defendant as his agent. In these circumstances, the §1346 theory underlying the charges against Defendant was legally valid.

Id. at 724.

In the instant case, the Plea Agreement erroneously fails to state that the borrowers were the ones who were deprived of their “intangible right of honest services.” Similar to the victim in Williams, the borrowers entrusted defendant and Coast Bank with large sums of their borrowed monies. The borrowers utilized the banking services of Coast Bank and relied on Coast Bank and its Executive Vice-President of Mortgage Lending (the defendant Coon) to perform these services in an honest and loyal manner. In regard to the borrowed funds, defendant Coon, like the financial advisor in Williams, owed a fiduciary duty to the Coast Bank borrowers. The borrowers who entered into construction loan agreements with Coast Bank relied on the bank’s employees to treat them with honesty and loyalty. By charging an extra point at closing, and pocketing the proceeds, defendant violated his fiduciary duty to the borrowers.

In United States v. Villanueva Madrid, 302 F.Supp.2d 187 (S.D.N.Y. 2003), the defendant conspired with a bank vice-president to borrow monies in the names of her clients and used their assets as collateral in order to make money for her own personal benefit. In the indictment, the government alleged “that defendant and her co-conspirator conspired ‘to defraud [the vice president’s] clients of money and [the vice-president’s] honest services as a trust officer and investment advisor.’ ” Id. at 192. Accordingly, the

court held that the government's allegations fell within 18 U.S.C. §1346 because the bank vice-president "breached a fiduciary owed to her clients." Id.

The Plea Agreement in the present prosecution does not allege that Coast Bank was required to compensate borrowers for the borrowed funds skimmed and converted by defendant. All the Plea Agreement states is that defendant's actions put Coast Bank *at risk* of suffering economic harm (Plea Agreement, Page 16). The borrowers, on the other hand, suffered actual economic harm. Coast Bank and its successor, First Bank, have collected loan payments and payoffs from borrowers which incorporated the skimmed money and have secured money judgments from borrowers incorporating the skimmed money. What defendant should have been charged with and pled to was depriving the borrowers of the "intangible right of honest services."

### **CONCLUSION**

This Court should reject the Report and Recommendation of the United States Magistrate Judge and require the correction of the erroneous statements in the Plea Agreement casting Coast Bank, rather than the borrowers, as having been deprived by defendant "of the intangible right of honest services."

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing on November 13, 2008, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney ([rachelle.bedke@usdoj.gov](mailto:rachelle.bedke@usdoj.gov)); James E. Felman, Kynes, Markman & Felman, PA ([jfelman@kmf-law.com](mailto:jfelman@kmf-law.com)), counsel for defendant; and Marcelino J. Huerta, III ([huertalaw@lawyers.com](mailto:huertalaw@lawyers.com)), counsel for defendant and a true and correct copy of the foregoing was furnished by regular U.S. Mail to David

Tremmel, Federal Probation Officer, Post Office Box 3905, Tampa, FL 33601.

**LEVIN TANNENBAUM**

1680 Fruitville Road

Suite 102

Sarasota, Florida 34236

Telephone: (941) 308-3157

Facsimile: (941) 316-0301

Attorneys for Borrowers

/s/ Alan E. Tannenbaum

Alan E. Tannenbaum, Esq.

Florida Bar No. 0259144

[atannenbaum@levintannenbaum.com](mailto:atannenbaum@levintannenbaum.com)